IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO.313 OF 1994

The State of Maharashtra .. Appellant

vs.

Pandurang Yeshwant Mahadik .. Respondent.

Smt. V.R.Bhosale, Public Prosecutor for the Appellant.

Mr.P.G.Pawar, Advocate for the Respondent.

With

CRIMINAL APPEAL NO.314 OF 1994

The State of Maharashtra .. Appellant

vs.

Pandurang Yeshwant Mahadik .. Respondent.

Smt. V.R.Bhosale, Public Prosecutor for the Appellant.

Mr.P.G.Pawar, Advocate for the Respondent.

Coram : S.S.Parkar &
S.R.Sathe, JJ.

Dated : 4th October, 2004

ORAL JUDGMENT (Per :S.R.Sathe, J)

1. The State of Maharashtra has preferred these two criminal appeals against the judgment and order passed by the court of Additional Sessions Judge, Pune, in Sessions Case No. 248 of 1993, whereby the accused was acquitted or the offences punishable under section 498A of I.P.C. and convicted for the offence punishable under section 325 of I.P.C. but instead of awarding any sentence, released him on probation of good conduct as per Section 4 of Probation of Offenders Act, 1958 and directed to execute bond with one surety for amount of Rs.3000/- for a period of two years.

2. Brief facts giving rise to these two appeals are as under :

. Deceased Nimabai was wife of accused Pandurang Yeshwant Mahadik. Their marriage had taken place when deceased was about 8 to 9 years of age. Thereafter the accused was serving in military and was posted at various places. Accused performed second marriage and from that he had 3, 4 children. However, as his second wife

Vatsalabai died in an accident accused performed third marriage. After retirement from military services, the accused started residing at Pune and he also took a job in Kendriya Vidyalaya Campus, and started residing in the campus of the said Vidyalaya. Though the marriage of deceased had taken place with the accused long back, she was actually residing with her mother at Surat. It is the prosecution case that few days prior to the incident the deceased had come to Pune and started residing initially in Indira Vasahat Zopadpatti and thereafter she started residing with the accused i.e. since about one week prior to the incident.

3. On the day of the incident i,e, on 10.9.1992 in the morning deceased asked accused to take bath. On that accused got annoyed and he gave kick on the waist of deceased. He also took her in the bathroom gaged her mouth and she was made to lie down and then pressed her neck from backside by keeping his foot. As a result of the same the deceased sustained severe pains. On 11.9.1992 at about 11.00 a.m. she was admitted in

Sasoon Hospital. On 12th or 13th of September, 1992 one social worker by name Surekha Gade met the deceased and at that time she informed her that she was assaulted by her husband and her neck was pressed by him by keeping his feet on the same. Surekha Gade therefore went to police station and gave information about the complaint made by deceased, to the police. However, the police insisted for medical certificate and Surekha Gade told them that she would produce the same. On 13.9.1992, Nimabai made a complaint to Doctor on duty that she sustained the pains as a result of the assault made by her husband. The doctor therefore made enquiry to that effect and wrote a chit to incharge of Sasoon Hospital that the said case be treated as Medico Legal Case. On 16.9.1992 Police Head Constable Sahebrao Bagade (P.W.6) went to the hospital and made enquiry with Nimabai. At that time she told police constable that her husband assaulted her and thereby narrated the story to him. The police headconstable Bagade therefore reduced the complaint given by Nimabai into writing and forwarded the said complaint alongwith covering

letter, exhibit 15, to the concerned police station. On receipt of the said complaint by the police station, the police registered crime No.333 of 1992 against the accused for the offence punishable under section 338 of I.P.C. However, subsequent to that police received information about the injuries sustained by Nimabai. Hence they registered the offence punishable under section 325 of I.P.C. and recorded the statements of the witnesses. They noticed that deceased Nimabai took discharge from the hospital on 16.10.1992. PSI Bhat therefore went to the house of Nimabai and recorded her statement. Unfortunately, Nimabai died on 16.11.1992. Police therefore sent the dead body for post mortem. Dr. Pherwani performed the post mortem and submitted the report. From the post mortem report it transpired that the death was caused due to toxaemia and septicaemia, due to bedsores. Police therefore, registered the offence punishable under section 302 of I.P.C. and after completion of investigation submitted the chargesheet against the accused in the Court of J.M.F.C. Court No.9, Pune for the offence punishable under section

498A, 325, 302 of I.P.C. Finding that the accused was chargesheeted for the offence punishable under section 302 of I.P.C. which is exclusively triable by the Court of Sessions, the learned J.M.F.C. committed the case to Sessions Court, Pune.

4. The Additional Sessions Judge framed charge exhibit 2 against the accused for the offences mentioned above. The charge was readover and explained to the accused. He pleaded not guilty and claimed to be tried. From the suggestions put to the prosecution witnesses and from the statement given by the accused under section 313 of Cr.P.C. it appears that the defence of the accused was of total denial.

5. In order to bring home the guilt of the accused, the prosecution examined as many as eight witnesses, consisting of Social Worker Surekha Gade - exhibit 7, P.W.2 Mahadeo Jadhav -exhibit 8, another witness Shantabai Adagale - exhibit 9, mother of deceased Parvatibai Khopade - exhibit 10, Dr. L.G.Pherwani - exhibit 12, police head

constable S.T.Bagade - exhibit 13, another doctor who examined the deceased on admission i.e. Dr. Shekhar Chirmade - exhibit 19, and the investigating Officer PSI Bhat - exhibit 24. The prosecution also produced the complaint exhibit 14, report exhibit 15, post mortem notes exhibit 11 etc. After considering the evidence adduced by the prosecution the learned trial judge came to the conclusion that there was sufficient material on record to establish that the accused assaulted his wife Nimabai on 10.9.1992 and as a result of the same she sustained grievous injuries i.e. fracture to C4, C5 as mentioned in column no.17 of the post mortem notes. The learned trial judge, however, came to the conclusion that the prosecution has failed to establish the charge under section 498A as well as under section 302 of I.P.C. He, therefore, convicted the accused for the offence punishable under section 325 of I.P.C. Finding that the accused was previously serving in military, at the time of incident he was about 60 years of age and considering the subsequent conduct the learned trial judge, instead of awarding any sentence released the accused on

probation of good conduct.

5. Being aggrieved by the said order the State of Maharashtra has preferred this criminal appeal no.313 of 1994 for enhancment of sentence while the other appeal no.314 of 1994 is filed against the order of acquittal under section 302 of I.P.C.

6. In this appeal before us, Smt. Bhosale, learned APP has urged two points. Firstly, she submitted that the trial court has erred in holding that the prosecution has failed to adduce any evidence to show that the accused committed murder of his wife Nimabai. According to her even the learned trial judge had also observed that the injuries in question were sufficient in the ordinary course of nature to cause death and the accused had infact knowledge that such injuries would cause death. Even then the learned trial judge held that there was no intention on the part of the accused to commit murder of Nimabai and wrongly acquitted the accused. Besides this, she also canvassed before us that even if it is held

that the accused was guilty of the offence punishable under section 325 I.P.C. only still then the facts and circumstances were not sufficient to release the accused on probation of good conduct. She, therefore, submitted that the appeals be allowed and necessary orders be passed. As against this Shri P.J.Pawar, learned Advocate for the accused submitted that there was absolutely no evidence against the accused to connect him with the alleged crime and the trial court should have acquitted the accused of the offences with which he was charged.

6. From the material on record it is very clear that admittedly deceased Nimabai was the wife of accused and their marriage had taken place when Nimabai was infact minor. It is also not in dispute that the accused had infact performed three marriages. Admittedly, he was serving in military and as such was posted at various places and after retirement he started residing at Pune. It is also very clear that for a long time the deceased was infact residing with her mother at Surat and had returned to Pune only about a year

back and even at that time she was not residing in the house of accused, but at some different place and had started residing with the accused only few days prior to the incident. It is also not in dispute that on 11.9.1992 Nimabai was admitted in Sasoon Hospital and at that time Dr. Shekhar Chirmade examined her and he noted paralysis of upper and lower limbs and neck pain. After examination of X-ray it revealed dislocation C-5 vertebra from C-4 and C-6. It is also an admitted fact that Nimabai was in the hospital till 16.10.1992. It appears from the record that on that day also she was not actually discharged by the doctor, but she took the discharge against the advise of doctor through her mother on 16.10.1992. Admittedly, when she was residing at the house of accused, on 16.11.1992 she died. Post mortem report, exhibit 11, shows that there were following external injuries :

(1). A deep ulcer 6" x 5" present on the back side in second are intected subeation & muscle tissue totaly thinned out and bones exposed.

(2). A deep bed sore ulcer on the back Rt. laterally situated area 4" x 3" skin measles subcut & Muscle tissue infected and exposed.

(3). A deep bed sore ulcer present on the back upper portion 5" x 4" skin subcut tissu and muscle exposed infected.

(4). Old healed scratches Rt. parital.

(5). Old healed Scratches Lt. parital area

(6). Ulcer present on the back present prints.

and the cause of death as shown is " Toxamia and septicaemia due to bed sore following injury."

7. The main and material question is whether the death of Nimabai is caused at the hands of accused. At the outset, it must be noted that there is no eye witness to the incident, nor there is such circumstantial evidence. The prosecution has relied only on the dying declaration, oral as well as written of Nimabai. So far as the oral

dying declaration is concerned, the prosecution is mainly relying on the testimony of witness Surekha Gade - exhbit 7 and Parvatibai Khopade exhibit 10 i.e. mother of Nimabai. Witness Surekha Gade is a social worker. She has stated that at the relevant time she was attached to S.N.D.T. College and was doing social work and used to attend the greviances of ladies. She has also stated that she was knowing Nimabai even prior to the incident. On 12th or 13th September, 1992 when she had been to the hospital, at that time Nimabai told her that on 10.9.1992 in the morning when she asked her husband to take bath, there was quarrel with him and she was made to lie down and then accused pressed his feet on her neck and as a result of the same she sustained severe pain. She also told her that accused was responsible for her such condition. She being social worker, informed this fact to police. However, police asked her to produce medical certificate. The learned Advocate for the accused argued before us that the evidence of Surekha Gade is not consistent and it appears that as it was her first case, she was interested in seeing that the case ends in conviction. He

also argued before us that there is reasonable doubt to hold that Surekha Gade must have induced the deceased Nimabai to give complaint in a particular manner. It is true that though Surekha Gade has stated that she met the mother of Nimabai for the first time on 18.9.1992 i.e. when she had been to hospital, there appears to be some discrepancy in her evidence. Still it can not be said to be of such importance which will go to the root of the matter and will create a doubt as to whether infact the deceased Nimabai would have made any such statement before her in which she had involved her husband. It must be noted that the evidence of Surekha Gade exhibit 7 is also corroborated by witness Sahebrao Bagade exhibit 13. He has stated that witness Surekha Gade had been to him and she had informed them about the story narrated by the deceased Nimabai or had given the information that Nimabai has been admitted as a result of the assault made to her by her husband but they had asked her to produce the certificate. It must be noted that Surekha Gade is an independent witness. She had absolutely no connection with the deceased or with the accused.

She had no personal interest in either of them. On the contrary, being a social worker she was interested only to see that justice is done to a woman who had sustained injury at the hands of her husband. So, when Nimabai gave information about the assault she immediately approached the police and also took efforts to secure medical certificate.

8. The second dying declaration is in the form of evidence of witness Parvatibai Khopade i.e. mother of deceased Nimabai. She has also categorically stated that on 18.9.1992 she received the telegram in which it was mentioned that Nimabai sustained injury as a result of assault by her husband and as such she went to Pune. She has further stated that when she met Nimabai in hospital, Nimabai told her that she sustained the said injury as a result of the assault made by the accused. Much is made about the fact that Parvatibai Khopade has not stated that there was any dispute between the accused and the deceased. At no point of time she had made complaint about ill-treatment at the hands of

accused. It is true that the said witness has clearly stated in her deposition that Nimabai had never made any complaint about ill-treatment against the accused. But that by itself is not at all sufficient to descredit her testimony. On the contrary, it would indicate that she is a truthful witness. She was bold enough to say that there was no complaint regarding ill-treatment made by her daughter, but at the same time she has stated that on 18.9.1992 when she met Nimabai in hospital she had infact made a grievance against the accused and told her that she was assaulted by the accused. She was also told by Nimabai that accused caused injury to her by putting his feet on her neck and by pulling her hands. The evidence of Parvatibai Khopade is not at all shaken or shattered in the cross examination. The learned trial judge has rightly believed the testimony of these two witnesses namely Surekha Gade and Parvatibai Khopade and held that there was oral dying declaration to these two witnesses.

9. There is another piece of evidence which connects the accused with the alleged crime. It

has come on record that police head constable Sahebrao Bagade, who was then attached to the concerned police station had been to Sasoon Hospital on 6.9.1992 in pursuance of the oral complaint made to him by Social Worker Surekha Gade. The said witness has stated that on 16.9.1992 he made query with Nimabai about her condition and at that time she narrated her entire story or rather sequence of events which took place on 10.9.1992. Naturally, police constable Bagade reduced her complaint into writing and obtained the thumb impression of Nimabai on the same. Now, this statement recorded by the police head constable Sahebrao Bagade has been severely criticized by the learned Advocate for the accused. According to him, firstly, there was infact no reason for Bagade to go to hospital. If really he would have gone to the hospital then there would have been some official entry in the police station, but there is no such entry in the police station. Admittedly, nobody had directed him to go to the hospital and enquire into the matter. It was therefore argued that the evidence of police head constable Sahebrao Bagade can not

be accepted. It is true that there is no evidence to show that Sahebrao Bagade, constable had gone to Sasoon hospital on 16.9.1992 as a result of any direction given to him by his superior. However, at the same time we cannot ignore the fact that there is sufficient evidence to show that Surekha Gade exhibit 7 had made a complaint to him, about the greviance that was made to her by Nimabai and at that time he had told her to bring necessary medical certificate. So, that was infact the cause for him to go to Sasoon hospital. Question arises whether because there is no official entry in the police station indicating that Sahebrao Bagade was asked to go to Sasoon hospital and record the complaint or dying declaration of Nimabai, it can be said that document exhibit 14 is fictitious or cooked up by the police head constable Bagade at the instance of Surekha Gade. It must be noted that there is nothing in the cross examination of Bagade which would indicate that he had any special interest in deceased or had any grievance against the accused. It seems that as he received the complaint through Surekha Gade, he only went there just to find out as to

what was the matter. At that time he recorded statement of Nimabai. Much is made about the fact that the said statement does not bear any endorsement of the medical officer to show that at the relevant time Nimabai was physically and mentally in a fit condition to give such statement. It appears that according to Bagade he had not recorded the said statement as dying declaration, but he has infact reduced the same into writing treating it as a complaint and that is why he had not obtained any endorsement on the same by the doctor. However, it is pertinent to note that immediately after this statement was recorded he forwarded the same alongwith covering letter exhibit 15 to concerned police station. So, this also suggests that the moment he came to know that the deceased had sustained injuries at the hands of the accused, he took legal action against the accused and asked the concerned police station to register the offence. Admittedly, on the basis of exhibit 14 crime was registered at No.333/92 for the offence punishable under section 338 of I.P.C. Thus we find that as the injured Nimabai died on 16.11.1992 i.e. after her

statement was recorded, the said statement is admissible as per the provisions of section 32(i) of the Indian Evidence Act. The learned trial judge has elaborately discussed this point in his judgment and has rightly held that the statement recorded by police constable Shri Bagade at exhibit 14 can be regarded as a dying declaration.

9. The statements in the above two dying declarations as well as one written dying declaration exhibit 30 is corroborated by medical evidence. From the perusal of the evidence of Doctor Pherwani exhibit 12 as well as Doctor Chirmade exhibit 19 it is very clear that deceased Nimabai had sustained grievous injuries. There was fracture to C4 and C5. Both the doctors have categorically stated that the injuries sustained by Nimabai were not possible due to simple fall. They have also stated that such injury is possible if neck is pressed by keeping leg on the neck and hands are pulled on the backside. Merely because on 11.9.1992 when Nimabai was admitted in the hospital history of paralysis and other was given we can’t jump to the conclusion that at the

relevant time she had not sustained such fracture i.e. C4 & C5. It is pertinent to note that the other evidence on record infact suggests that when she was taken to hospital she was not in a position to give any statement. It is worth to note that it is not stated by anyone that at any time history of fall was given. So merely because we are not finding history of assault on the case paper prepared at the time of admission, we can't jump to the conclusion that the story of assault is a subsequent thought. On the contrary, it must be noted that Dr. Chirmade has specifically stated that on 13.9.1992 the injured Nimabai gave history of assault at the hands of her husband and that is why he reported the matter to the concerned officer. Thus, we find that medical evidence also corroborates the prosecution version that Nimabai sustained injuries as a result of assault by accused putting his leg on the neck and pulling back her hands.

10. In the instant case though the incident of assault had taken place on 10.9.1992, the injured has died on 16.11.1992. Out of the said period,

for a long time the injured was treated in the hospital and subsequently she was discharged and went to the house of the accused. When the dead body was taken for post mortem Dr. Pherwani has opined that death was caused due to toxaemia and septicemia due to bed sores following injury. Thus, from the cause mentioned in the post-mortem note the injuries in question can not be said to be direct cause of death of Nimabai. Infact, the doctor has also mentioned that death was due totoxaemia and septicemia due to bed soars following injury. Subsequently he has made an attempt to show that the word injury mentioned in the said column is referable to injury no.22. If really the death would have been caused as a result of injuries sustained then normally the doctor would have mentioned that the cause of death was injury sustained to C4 and C5. But that has not happened. So, we are of the view that prosecution has failed to prove that the death of Nimabai was caused due to the injuries sustained to her, which are mentioned in column no.22 or at 18. Once it is held accordingly, merely because the doctor has said that the injuries in question

were sufficient in the ordinary course of nature to cause death if proper medical help would not have been given we cannot jump to the conclusion that the case falls under section 307 of I.P.C. or 302 of I.P.C. However, as the accused had caused injuries in question to Nimabai and the same were admittedly grievous one, the learned trial judge was right in holding the accused guilty of the offence punishable under section 325 I.P.C. The order of conviction to that effect has to be confirmed.

11. Turning to the question of sentence it appears that the learned trial Judge instead of sentencing the accused has released him on probation of good conduct because the accused was of 60 years age and had previously served in military and his two daughters and other wife was also dependent on him. While considering the aspect of punishment one has to take into consideration all the facts and circumstances of the case and the manner in which the offence has been committed. In the instant case, the accused who was a military man at one point of time, has

assaulted his wife in a rude manner and had even pressed her neck by keeping his leg on her neck and pulling her hands backside, as a result of which there was fracture to C4 and C5. So, when such cruel act has been committed by the accused, it is infact necessary to punish him with imprisonment so as to pinch him and prevent others from committing such type of offence again. We, therefore, feel that the release of the accused on probation of good conduct was not warranted under the facts and circumstances of the present case. However, while considering the quantum of sentence of punishment and considering the peculiar facts and circumstances of this case as well as the fact that now the accused is of 70 years of age, and there are other dependents on him, we pass the following order which would meet the ends of justice.

ORDER

. Criminal Appeal No. 313 of 1994 is allowed and the order of releasing the Respondent-

accused on probation is set aside and instead he is convicted for the offence punishable under section 325 of I.P.C. and is sentenced to suffer R.I. for One year and to pay fine of Rs.3000/- (Rupees Three Thousand Only) i.d. to suffer R.I. for two months.

. The accused is entitled to get set of for the period of detention undergone by him, as per section 428 of Cr.P.C.

. Accused to surrender his bail forthwith.

. Criminal Appeal No.314 of 1994 is dismissed.

(S.S.Parkar, J)

(S.R.Sathe, J)